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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

TODD VANDEHEY, an individual,

Plaintiff,

v.

REAL SOCIAL DYNAMICS, INC., a Nevada
corporation; NICHOLAS KHO, an individual;
OWEN COOK, an individual; John Does 1
through 10, all whose true names are unknown;
ABC Companies 1 through 10, all whose true
names are unknown.

Defendants.

CASE NO.: 2:17-cv-02230-JAD-NJK

**PLAINTIFF'S OPPOSITION TO
DEFENDANTS' MOTION TO COMPEL
ARBITRATION AND DISMISS
PLAINTIFF'S AMENDED COMPLAINT**

ORAL ARGUMENT REQUESTED

Plaintiff Todd VanDeHey ("Plaintiff"), by and through his attorneys, the law firms of
McDONALD CARANO LLP and the NISSENBAUM LAW GROUP, LLC, hereby file this
opposition to the Motion to Compel Arbitration and Dismiss Plaintiff's Amended Complaint
[ECF Nos. 45 and 48] filed by defendants Real Social Dynamics, Inc. ("RSD"), Nicholas Kho
("Kho") and Owen Cook ("Cook") (RSD, Kho and Cook collectively, the "Defendants").

MEMORANDUM OF POINTS AND AUTHORITIES**PRELIMINARY STATEMENT**

How can we engage in meaningful arbitration when the Defendants have improperly hacked Plaintiff's personal email account and thereby been given access to privileged attorney-client communications and work product about the very legal strategy in the subject matter of the proposed arbitration? In order for the Defendants to seek to have this Court compel anything, they must have clean hands. How are their hands clean in seeking this Court's assistance to compel a confidential arbitration using pilfered materials to their advantage? On what basis do they have the right to have this Court further—and cover up as confidential—evidence of their wrongdoing?

According to the Defendants, the basis for this absurd legal position is that they conjecture Plaintiff's personal email may contain some business-related communications. But even if that were true, why not serve a discovery request or seek a court order for production of just those emails? Why commit what is essentially a computer crime to access Plaintiff's private email account without the Plaintiff's or the Court's authorization or even knowledge? Again, what legal theory gave them license to hack?

In fact, the Defendants' position that the personal email account may have been used for some business communications—which is obviously not a basis to authorize a computer crime, in any event—is highly suspect. Simply put, it contradicts their earlier position. On August 12, 2017, Defendants' counsel forwarded Plaintiff's counsel an email outlining the "RSD tech platforms/accounts" as to which Plaintiff's access would be terminated. *See* Defendants' Opposition to Plaintiff's Emergency Motion for a Temporary Restraining Order and Preliminary Injunction, Exhibit K, ECF No. 23-11. In that communication, Defendants only listed emails with the domain ending @*realsocialdynamics.com*, which they denominated as "RSD email domains". *Id.* Nowhere in the email did Defendants indicate that Plaintiff's personal Gmail account was one of the RSD tech platforms/accounts; they never listed the Plaintiff's personal email account "tvandehey@gmail.com" as a business account or asset.

...

1 However, now that the Defendants have committed what appears to be a computer crime,
2 the Defendants have retroactively concocted the argument that Plaintiff's personal Gmail account
3 is a business asset of RSD. Nevertheless, the record is clear: the Defendants omitted Plaintiff's
4 personal Gmail account from their prior list of the RSD business accounts; that is an admission
5 by the Defendants that they did not consider the Plaintiff's personal Gmail account an RSD
6 business asset.

7 That only makes sense. Obviously, the configuration of the personal Gmail account
8 verifies that it is personal in nature. The Gmail account consists of the initial of Plaintiff's first
9 name "T" and his last name "VanDeHey". It does not include his professional alias that he used
10 for Valentine Life's business matters "Todd Valentine". In other words, on its face, the email
11 account is personal and has nothing to do with RSD or Valentine Life.

12 But there is an even more immediate reason to conclude that the Defendants are well
13 aware that they have committed what amounts to a computer crime: they have failed to deny it.

14 There is not one reference in their moving papers to their ever denying that they hacked
15 Plaintiff's personal Gmail account. That is a point that bears emphasis: Plaintiff's counsel have
16 asked them in writing on multiple occasions whether or not they illegally hacked Plaintiff's
17 personal email account, and yet at every such opportunity, they have failed to deny it. One must
18 ask why a party to a civil suit being asked whether they committed a cyber-crime in connection
19 with the subject matter of that suit—and pending arbitration—repeatedly has failed to deny it.
20 What reason could there be for refusing to deny something that any rational party would deny (if
21 it were not true)?

22 Perhaps one way of getting to the bottom of this would be for this Court to demand that
23 the Defendants state on the record whether or not any of them have accessed Plaintiff's personal
24 email account, and if so, to immediately produce to the Plaintiff all email and related attachments
25 downloaded from that intrusion. In other words, if the Defendants will not tell the Plaintiffs what
26 they have done, perhaps it is time for the Court to intervene to ensure that happens.

27 Clearly, the Defendants have made the craven decision that the right course of conduct is
28 to hide their improper acts by taking the position that everything should be placed into

1 confidential arbitration where they can hide their actions from scrutiny. Indeed, the fact that they
2 want this entire dispute handled confidentially is their one last hope of covering up what may
3 amount to a cyber-crime. But again, what legal precedent would allow a party to use the
4 confidentiality restriction of an arbitration provision to cover up such wrongful conduct—and to
5 seek the Court’s assistance in doing so?

6 It is not an exaggeration to state that this has all been a bald-faced attempt to mislead the
7 Court. On September 8, 2017—just two days before Plaintiff’s Gmail account was hacked—the
8 parties were before this Court on Plaintiff’s Emergency Motion for a Temporary Restraining
9 Order and Preliminary Injunction regarding Valentine Life’s business assets. However, at no
10 point during the hearing did Defendants indicate that the Gmail account tvandehey@gmail.com
11 was a business asset of Valentine Life. Indeed, at no point did they indicate that they were about
12 to hack into that account and download emails contained therein. *See* September 8, 2017
13 Emergency Motion Hearing Transcript, ECF No. 48, Exhibit 1.

14 If the Defendants considered the Court’s denial of Plaintiff’s Emergency Motion for a
15 Temporary Restraining Order and Preliminary Injunction a license to hack into the Gmail account
16 and steal Plaintiff’s private communications, including attorney-client and work product
17 privileged information, why did they not just say so? Why did they hide something that it was
18 their position they were authorized to do? Why do it in secret?

19 All of which leads to the central point: even if the causes of action stated in the Amended
20 Complaint were arbitrable—which they are not—how can Plaintiff arbitrate when he does not
21 know which of his arguably stolen privileged and confidential attorney-client communications
22 the other side possesses? Indeed, the apparent theft of Plaintiff’s attorney-client communications
23 leads to the ineluctable conclusion that confidential arbitration cannot be conducted in a way that
24 comports with basic fundamental fairness.

25 Accessing Plaintiff’s personal Gmail account without authorization and stealing his
26 attorney-client communications is not an issue to be decided in secret based on a confidential
27 contractual arbitration provision in the Valentine Life Operating Agreement (“Operating
28 Agreement”).

Indeed, one must ask an even more basic question: what authority does an arbitrator have to determine whether or not a crime has occurred—especially when such a determination would be made under the cloak of contractual confidentiality? In other words, to the extent a serious federal crime has been committed, and the Defendants seek to impose confidentiality restrictions on the disclosure of evidence and findings relating to that fact, would that not place the arbitrator in the position of potentially being a conspirator after the fact engaged in an illegal cover-up or alteration of evidence of a crime? And what position would that put this Court in, were an order to be entered enforcing such confidential arbitration of a potential crime?

For all these reasons, the instant motion should be denied.

POINT ONE

A. DEFENDANTS HAVE FAILED TO MEET THE STANDARD FOR A MOTION TO DISMISS

“A motion to dismiss for lack of subject matter jurisdiction may either attack the allegations of the complaint or may be made as a ‘speaking motion’ attacking the existence of subject matter jurisdiction in fact.” *Thornhill Pub. Co. v. Gen. Tel. & Elecs. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979). “Where the jurisdictional issue is separable from the merits of the case, the judge may consider the evidence presented with respect to the jurisdictional issue and rule on that issue, resolving factual disputes if necessary.” *Id.*

Here, Defendants have not attacked the allegations of the complaint but the existence of subject matter jurisdiction itself by asserting that all the causes of action alleged in the Amended Complaint should be submitted to arbitration. To restate the obvious, this argument must fail because Defendants have put forth no evidence that demonstrates Plaintiff agreed to arbitrate any dispute regarding criminal hacking into his personal Gmail account. The allegations in the Amended Complaint are based on unauthorized access into the Plaintiff's personal email account, not a contractual dispute. The Amended Complaint clearly states causes of action that are not subject to arbitration.

• • •

1 **1. Arbitration of the Unauthorized Access into Plaintiff's Gmail Account is Not**
2 **Appropriate.**

3 Defendants make the absurd argument that the mere fact that Plaintiff may have used his
4 Gmail account for business makes any unauthorized access into his personal email by the
5 Defendants subject to arbitration. Even if Plaintiff used the Gmail account for business, what
6 legal right do Defendants have to access the account without authorization? To the contrary, they
7 do not.

8 The Southern District of New York has found that an employer has no right to access an
9 employee's personal email, even when that personal email was accessed from business
10 computers and the passwords were in the employer's systems. In *Pure Power Boot Camp v.*
11 *Warrior Fitness Boot Camp*, 587 F. Supp. 2d 548, 561 (S.D.N.Y. 2008), the Court held that the
12 employee "had a subjective belief that his personal e-mail accounts, stored on third-party
13 computer systems, protected (albeit ineffectively) by passwords, would be private. That
14 expectation of privacy was also reasonable." Indeed, the actions against Plaintiff in the instant
15 matter are more egregious than those in *Pure Power*, as Defendants have consistently alleged
16 that Plaintiff was an independent contractor. An independent contractor would arguably have an
17 even greater expectation of privacy in his personal email than an employee would.

18 Moreover, the very premise of Defendants' argument that it had a right to such access
19 would be absurd. The hacking into Plaintiff's personal Gmail account took place a month after
20 Plaintiff was "terminated" from RSD. How is the unauthorized access into Plaintiff's email
21 account a month after his termination subject to confidential contractual arbitration relating to a
22 business dispute that concerns matters that occurred before the termination?

23 This would be tantamount to Plaintiff leaving his house keys at work, and then being
24 ordered by this Court to arbitrate whether the Defendants had the right to use those keys to
25 burglarize his house a month after he was fired. What would the Defendants' position be then,
26 that the burglary was justified because at some earlier point Plaintiff performed work at his
27 home? And what law would allow the Defendants to burglarize Plaintiff, in any event?

28 ...

1 The issue is not whether Plaintiff used his personal email for business, rather it is whether
2 Plaintiff's personal email was accessed illegally. Clearly, the wrongful access into Plaintiff's
3 personal Gmail account constitutes intentional tortious—and possibly criminal—conduct against
4 Plaintiff which is not subject to any arbitration agreement between Plaintiff and the Defendants.

5 **2. Defendants Have Failed to Demonstrate Plaintiff's Personal Gmail Account is a**
6 **Business Asset.**

7 Defendants have asserted without any support that Plaintiff's personal Gmail account is a
8 business asset. Plaintiff has already informed the Court of the personal nature of his Gmail
9 account. *See* Declaration of Todd VanDeHey in Support of Plaintiff's Emergency Omnibus
10 Motion (1) For Expedited Discovery and (2) to Amend the Complaint, dated September 25,
11 2017, ECF No. 29. But if the Defendants considered Plaintiff's personal email account a
12 business asset to which they required access, where are the advance request for access? There are
13 none because Defendants have just recently asserted Plaintiff's personal email is a business asset
14 as a Hail Mary in attempt to conceal their wrongdoing.

15 Indeed, as set forth above in the Preliminary Statement, Defendants failed to identify
16 Plaintiff's personal Gmail account in a prior list of RSD assets, as to which they indicated
17 Plaintiff's access would be terminated. *See* ECF No. 23-11. Not until Defendants filed their
18 opposition to Plaintiff's motion for summary judgment and the instant motion was there ever any
19 indication that they considered Plaintiff's Gmail account a business asset.

20 By Defendants' logic, the fact Plaintiff may have used the personal email account for
21 business matters grants Defendants the unlimited right to secretly and without advance notice
22 access all of Plaintiff's personal email anytime and without authorization. Again, this includes
23 attorney-client and work product privileged material generated by Plaintiff's counsel. Clearly,
24 Defendants have no right to hack into Plaintiff's personal email any more than they have a right
25 to break into his house

26 The Stored Communications Act, 18 U.S.C. 2701; Computer Fraud and Abuse Act, 18
27 U.S.C. 1030; and the Nevada Computer Crimes Act, NRS 205.4765 (as alleged in the Amended
28 Complaint) prohibit this misconduct. Indeed, if an individual or entity were allowed to secretly

1 hack into another's email account every time there was an allegation that a personal email
2 contained business emails, our Federal Rules of Civil Procedure would be rendered meaningless,
3 and the civil litigation process would be effectively become a mechanism to cover up a crime.

4 In sum, the causes of action in the Amended Complaint relate to wrongdoing against
5 Plaintiff personally. They do not relate to wrongdoing committed against Valentine Life and are
6 not subject to the arbitration provision of the Operating Agreement governing Valentine Life.

7 **CONCLUSION**

8 For the foregoing reasons, it is respectfully requested that the Court deny the Defendants'
9 application, together with such other, further and different relief as the Court deems just,
10 equitable and proper under the circumstances.

11 RESPECTFULLY SUBMITTED this 27th day of November, 2017

12 NISSENBAUM LAW GROUP, LLC

13
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of McDonald Carano LLP, and that on or about the 27th day of November, 2017, a true and correct copy of the foregoing **PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO COMPEL ARBITRATION AND DISMISS PLAINTIFF'S AMENDED COMPLAINT** was electronically filed with the Clerk of the Court by using CM/ECF service which will provide copies to all counsel of record registered to receive CM/ECF notification.

/s/ Jelena Jovanovic

An employee of McDonald Carano LLP